Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court Of The United States
October Term, 1996

JOHN KRONBERG, ET AL.
Petitioners

v.

CHICAGO TITLE INSURANCE COMPANY, ET AL.
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

Counsel of Record:

F. WOODWARD LEWIS, JR.
439 Main Street
P.O. Box 4429
Yalesville, CT 06492
(203) 265-2829

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QUESTION PRESENTED FOR REVIEW

IS THE APPLICATION OF CONNECTICUT RULES APPELLATE PROCEDURE, §4046, §4049, AND §4053 TO THE FACTS OF THIS CASE REPUGNANT TO THE PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SINCE IT PERMITS THE LIFTING OF THE AUTOMATIC STAY OF EXECUTION WITHOUT AFFORDING PETITIONER AN OPPORTUNITY TO BE HEARD AT A MEANINGFUL TIME AND MEANINGFUL MANNER ON THEIR SPECIAL DEFENSES AND COUNTERCLAIMS PRIOR TO BEING DEPRIVED OF POSSESSION OF THEIR HOME THROUGH FORECLOSURE.

PARTIES TO THE PROCEEDING

PETITIONERS:

John W. Kronberg, Sr. (Defendant Below)
Constance Kronberg
Michael Kronberg

RESPONDENTS:

Chicago Title Insurance Company
Union Trust Company
N.P. Funding I Lim.Part.
Dime Savings Bk of Wallingford
Lafayette American Bank & Trust Company, fka American National Bank
State of Connecticut

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTION 2

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF CASE 4

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 11

TABLE OF AUTHORITIES

PAGE

CASES:

Armstrong v. Manzo, 380 U.S. 545 9

Baldwin v. Hale, 68 U.S. 223 9

Boddie v Connecticut, 401 U.S. 371 9

Connecticut v. Doehr, 501 U.S. 1 (1991) 10

Construction & General Laborers' Union v. Curry, 371 US 542 (1963) 3

Grannis v. Ordean, 34 U.S. 385 9

Hite v. Field, 38 Conn. Sup. 70 (1982) 10

Hovey v. Elliot, 167 U.S. 409 9

Mathews v. Eldridge, 424 U.S. 319 (1976) 10

Mercantile National Bank v. Langdeau, 371 US 555 (1963) 3

Organization for a Better Austin v Keefe, 402 US 415 (1971) 3

Roundhouse Construction Corp. v. Telesco Masons Supplies Company, 168 Conn. 371 (1975) 9

Windsor v. McVeigh, 93 U.S. 274 9

CT RULES OF PRACTICE:

Connecticut Rule of Appellate Procedure, §4046 . . . 3, 8

Connecticut Rule of Appellate Procedure, §4049 . . . 3, 8

Connecticut Rule of Appellate Procedure, §4053 . . . 3, 8

FEDERAL STATUTES:

28 U.S.C.S. §1257(a) 2

UNITED STATES CONSTITUTION:

U.S. CONST. amend. XIV, §1 . . . . . 3, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JOHN KRONBERG, ET AL
Petitioners,

V.

CHICAGO TITLE INSURANCE COMPANY, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The petitioners, John, Constance and Michael Kronberg respectfully pray that a writ of certiorari issue to review the decision of the Connecticut Supreme Court entered on July 3, 1997 dismissing petitioners' Petition for Certification to appeal from the judgment of the Connecticut Appellate Court which denied petitioner's Motion to Review the trial court's lifting of the automatic stay and the procedure which allows for lifting same.

OPINION BELOW

The opinion of the Connecticut Supreme Court is printed in Appendix A, infra, page 1A. The opinion of the Connecticut Appellate court is printed in Appendix B, infra, page 2A. The trial court (Celotto, J.) granted the respondent's Motion to Lift the Automatic Stay of Execution on April 18, 1997, in the Superior Court, Judicial District of New Haven at New Haven, CV 91 0317554S.

JURISDICTION

Jurisdiction for the petition for writ of certiorari is invoked under 28 U.S.C.S. §1257(a) which sets forth in relevant part:

> (a) Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the...validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution...

The trial and appellate court's lifting of the automatic stay was a final judgment within the meaning of §1257(a) even though an appeal of the underlying foreclosure action is still pending because there has been a final assertion of jurisdiction with no further review of the issue of the lifting of the stay possible at the state court level.

> Concept of finality has been expanded with respect to orders that otherwise might be deemed

interlocutory, where there is final assertion of jurisdiction with no further review of that issue possible in state court,...and state court judgment on issue is anterior to and separable from merits, and not enmeshed in factual controversies of case. *Construction & General Laborers' Union v. Curry*, 371 US 542 (1963), on remand 219 Ga 38, 131 SE2d 559, 54 BNA LRRM 2197, 48 CCH LC 50910; *Mercantile National Bank v. Langdeau*, 371 US 555, (1963); *Organization for a Better Austin v Keefe*, 402 US 415 (1971).

The opinion of the Appellate Court of the State of Connecticut, denying review of the lifting of the stay was entered on May 21, 1997 and the opinion of the Supreme Court of the State of Connecticut, Appendix A, infra, page 1A, dismissing the petition for writ of certiorari was entered on July 3, 1997.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, §1

The Connecticut Practice Book, Rules of Appellate Procedure are as follows:

Connecticut Rule of Appellate Procedure, §4046
Connecticut Rule of Appellate Procedure, §4049
Connecticut Rule of Appellate Procedure, §4053

STATEMENT OF CASE

John W. Kronberg, Constance Kronberg, and Michael Kronberg reside at 1755 Tuttle Avenue, Cheshire, Connecticut and all have a possessory interest therein. On or about August 13, 1986, the defendant John W. Kronberg executed a first mortgage and note to the Connecticut Savings Bank in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, secured by his interest in real property at 1755 Tuttle Avenue, Cheshire, Connecticut. On October 9, 1990 John W. Kronberg rescinded the transaction based upon inadequate disclosures under truth-in-lending statutes. On or about January 1, 1991 the instant foreclosure action was commenced by Federal Home Loan Mortgage Corporation. Constance and Michael Kronberg were not served. On January 11, 1991, F. Woodward Lewis entered his appearance for John W. Kronberg, Constance Kronberg and Michael Kronberg and on January 11, 1991 Constance and Michael Kronberg made a Motion to become party defendants because of their possessory interest in the real estate being foreclosed.

On February 25, 1991, the Kronbergs filed their general denial answer, special defenses and counterclaims. The first special defense alleged violations of the truth-in-lending laws. The second special defense alleged that the defendant Constance Kronberg and Michael Kronberg were not served with a notice to quit as required by §47a-23 so that the court lacked jurisdiction on the issue of possession and/or the foreclosure was unconstitutional because it did not provide for notice and hearing on the issue of possessory rights. Count One of the counterclaim alleged recoupment on the theory of violations of the truth-in-lending laws and count two alleged violations of the

Connecticut Unfair Trade Practices Act (CUTPA) based upon the said special defenses; i.e, truth-in-lending violation as to John Kronberg and failure to give notice to Michael and Constance Kronberg.

On or about February 26, 1991, Federal Home Loan Mortgage filed an Amended Complaint making Constance Kronberg and Michael Kronberg defendants.

On or about September 22, 1994, Federal Home Loan Mortgage filed a Motion to Strike. On or about November 7, 1994, Judge Celotto orally struck the answer and counterclaims as to John Kronberg and the second special defense and CUTPA counterclaim as to Constance and Michael Kronberg. The court did not strike the first special defense in truth-in-lending, rather the motion to strike same was withdrawn by plaintiff's counsel.

On November 9, 1994, the Kronbergs filed a Revised Answer and upon receiving notice on November 14, 1994 of the court's decision striking the special defenses and counterclaims filed a timely notice of intent to appeal on or about December 2, 1994. Thereafter, on December 9, 1994 the defendants filed a Motion for Judgment on said stricken special defenses and counterclaims.

On April 21, 1995 Federal Home Loan moved for Summary Judgment to which the Kronbergs objected. On September 25, 1995 the court heard both the Summary Judgment and the Motion for Judgment, ruled thereon and the Kronbergs filed the instant appeal on October 12, 1995. Thereafter, through a series of assignments, Chicago Title Insurance Company (hereinafter "Chicago Title") became the plaintiff.

The Appellate court on January 24, 1996 stayed the appeal pending the foreclosure judgment.

On March 7, 1997 a hearing was held on Chicago Title's Motion for Strict foreclosure and the court granted

said Motion, and refused to hear evidence on the first special defense alleging truth-in-lending violations, and the consequent recision of the mortgage being foreclosed. The court also failed to permit Constance and Michael Kronberg to be made parties although both the plaintiff and the defendant had treated them as such up until the filing of the original appeal. Thereafter, the Kronbergs timely filed an amended appeal on March 12, 1997 setting forth the following six issues:

1. Did the trial court abuse its discretion by granting summary judgment as to liability on the note?
2. Did the trial court abuse its discretion by striking all but one of defendant Kronberg's counterclaims and special defenses on November 7, 1994?
3. Did the trial court abuse its discretion by not permitting the defendant Kronberg a hearing on the truth in lending special defense?
4. Did the trial court abuse its discretion by not allowing the defendant John Kronberg to add an indispensable party?[1]
5. Did the trial court err in accepting an appraisal which reflected the value of the property at a time when access was allowed but did not reflect the value after foreclosure where zoning prohibits access?
6. Such other issues as may arise during the course of this appeal.

On April 7, 1997, Chicago Title pursuant to

---

[1] Tenants Constance and Michael Kronberg.

Connecticut Rule of Appellate Procedure §4056 filed a Motion to Terminate the Automatic Stay arguing that the stay should be terminated because it was taken solely for delay and/or the interests of justice so required. Despite objection by the Kronbergs to the Motion to Terminate the Automatic Stay, the trial court on April 18, 1997 granted said Motion. The defendant John Kronberg thereafter on April 24, 1997 filed a Motion for Review pursuant to Connecticut Rule of Appellate Procedure §4053 on April 24, 1997 arguing that he had a fundamental property interest at stake and due process entitled him to his day in court, i.e. to be heard at a meaningful time and in a meaningful manner and that lifting the stay deprives him of this right because if the defenses to the loss of the property by foreclosure are not allowed to be heard before the property interest is lost, there is no point in having and/or raising said defenses. Despite this argument, the Appellate Court, without hearing, denied the Motion for Review on May 21, 1997. The Kronbergs petitioned the Connecticut Supreme Court for certification to appeal from the judgment of the Appellate Court on the basis that the procedure permitting the lifting of the automatic stay was unconstitutional. However, the Supreme Court dismissed said petition for certification on July 3, 1997.

Therefore, even though there has never been a trial on the Kronbergs' special defenses and counterclaims, because of the lifting of the stay the pending appeal in this case is fruitless because even if successful the defendants will have lost the property at issue.

REASONS FOR GRANTING THE WRIT

The petitioners herein respectfully request that this Court issue a writ of certiorari because the procedure set

forth in §4046, §4049 and §4053 is repugnant to U.S. CONST amend XIV, §1 since the effect of allowing the lifting of the automatic stay is to deny the petitioners any opportunity to be heard on the merits of their appeal prior to losing possession of their home through foreclosure.

The procedure lifting the automatic stay and allowing for appellate review of same is set forth in Connecticut Practice Book, Rules of Appellate Procedure §4046, §4049, and §4053. Rule §4046 provides in pertinent part: "The automatic stay of execution may be terminated by the judge who tried the case if he or she is of the opinion that the appeal is taken only for the purpose of delay or that the due administration of justice requires that the stay be terminated."

Rule §4049 provides, "[t]he sole remedy of any party desiring the court to review an order concerning a stay of execution, shall be by motion for review under Sec. §4053." Rule §4053 provides in pertinent part, "[t]he court may, on written motion for review stating the grounds for the relief sought, modify or vacate...any order made by the trial court concerning a stay of execution in a case on appeal."

This procedure is unconstitutional as applied to the facts of this case since it does not allow the applicants an effective opportunity to be heard on the merits of either their truth-in-lending claims or their possessory interest claims to the subject property **prior to its loss by virtue of the termination of the automatic stay** and therefore fails to provide an opportunity to be heard at a **meaningful time** and a meaningful manner in violation of due process standards.

It is fundamental that property cannot be taken without procedural due process as guaranteed by the

> fourteenth amendment to the Constitution of the United States and article first, §10, of the Constitution of Connecticut. For more than a century, the central meaning of procedural due process has been clear. **Parties whose rights are to be affected are entitled to be heard**... *Baldwin v. Hale*, 68 U.S. 223, 233, 17 L.Ed 531; *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914, *Hovey v. Elliot*, 167 U.S. 409, 17 S.Ct. 841, 42 L. Ed 215; *Grannis v. Ordean*, 34 U.S. 385, 34 S.Ct. 779, 58 L. Ed. 1363. It is equally fundamental that the right to notice and **an opportunity to be heard "must be granted at meaningful time and in a meaningful manner.**" *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62. The United States Supreme Court has reiterated that these fundamental requirements apply to the deprivation of "any significant property interest." *Boddie v Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed. 113....

Roundhouse Construction Corp. v. Telesco Masons Supplies Company, 168 Conn. 371, 362 A. 2d 778, 781 (1975).

The "effective opportunity to be heard is the gravamen of the currently accepted standards of procedural due process in the area of property rights..." *Roundhouse, supra*, at 781. The lifting of the stay procedure prior to being heard on the merits of their appeal seeking to protect petitioners' right to possession deprives them of this effective opportunity.

The United States Supreme Court has long since employed the following three part inquiry originally set

forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed 2d 19 (1971) and modified by *Connecticut v. Doehr*, 501 U.S. 1, 11, 111 S.Ct. 2105, 2112, 115 L.Ed. 2d (1991) to determine whether a due process violation has occurred in the context of a dispute between private parties:

> ...[I]nquiry requires "first, consideration of the private interest that will be affected by the [procedure to lift the stay]; second, an examination of the risk of erroneous deprivation through the [procedure to lift the stay] and the probable value of additional or alternative safeguards; and third...principal attention to the interest of the party seeking the [lifting of the stay] with, nonetheless, due regard for any ancillary interest the government may have in providing the [lifting of the stay] or forgoing the added burden of providing greater protections."

Applying this analysis to the present case clearly illustrates the Kronbergs have been denied due process by the lifting of stay procedure. With respect to the first prong of the analysis the defendant John Kronberg and Constance and Michael Kronberg who have sought to become parties, all have a possessory interest which is affected by the lifting of the stay. Constance and Michael Kronberg as tenants of the subject property have had a possessory interest in the premises being foreclosed since at least August 13, 1987 and are thus entitled to an opportunity to be heard on the issue of possession. *Hite v. Field*, 38 Conn. Sup. 70,. 462 A. 2d 393 (1982). The defendant John Kronberg currently lives in the property and before being deprived of possession by virtue of the lifting of the stay, he is entitled to an opportunity to be heard on the merits of

his special defenses and counterclaim which raise the issue of whether due to a valid recision under truth in lending he, rather than the plaintiff, is entitled to remain in possession. Lifting the stay not only affects the Kronbergs' possessory interest, but deprives them of it altogether.

With respect to the second inquiry since the lifting of the stay does not afford an hearing on the issue of possession, the defendant John Kronberg and Constance and Michael Kronberg are left without an opportunity to ever protect their right to possession through presentation of their special defenses and counterclaims. The additional safeguard of allowing the stay to remain in effect while the defendants presents the merits of their claims on appeal substantially reduces the risk of erroneous deprivation.

Lastly, such an additional safeguard does not unduly impair whatever interest the plaintiff may have. If the defendants succeed in their appeal and are successful in presenting their special defenses and counterclaims at the trial court level it will mean they are entitled to the property and not the plaintiff. On the other hand, if defendants do not succeed, the plaintiff will still obtain possession at the time it acquires title if it is so entitled.

CONCLUSION

The procedure followed in the instant case which allowed for the stay to be lifted deprived the petitioners' of their due process rights to be heard at a meaningful time and in a meaningful manner and is therefore unconstitutional. The petitioners are entitled to be heard on the merits of their appeal at the Appellate Court without risk of deprivation of that which they are seeking to protect. Due process therefore requires that the stay remain in place. Nothing less will provide the applicants with the effective

opportunity to be heard they are entitled to under both Connecticut Supreme Court and United States Supreme Court precedent. The specter of having lost the property and or any rights therein might well discourage and chill petitioners rights to seek both Appellate Court and Supreme Court review even if they do prevail.

For all the reasons enumerated above, the petitioners John, Constance and Michael Kronberg pray this honorable court accept their petition for writ of certiorari.

RESPECTFULLY SUBMITTED,

BY F. WOODWARD LEWIS, JR.
Attorney for Petitioners
Juris No. 34239
Federal Bar #ct06737
F. Woodward Lewis, Jr. P.C.
439 Main Street
P.O. Box 4429
Yalesville, CT 06419
(203) 265-2829

No. _____

In The

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APPENDIX

APPENDIX TABLE OF CONTENTS

PAGE

APPENDIX A 1A

ORDER ON PETITION FOR CERTIFICATION TO APPEAL 1A

APPENDIX B 2A
ORDER 2A

APPENDIX C 3A
U.S. CONSTITUTION, AMENDMENT XIV 3A

APPENDIX D 4A
CT RULES OF APPELLATE PROCEDURE 4A
Sec. 4046 . . . . . 4A
Sec. 4049 . . . . . 5A
Sec. 4053 . . . . . 6A

APPENDIX A

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-96-0407

Federal Home Loan Mortgage Corporation

V.

John W. Kronberg et al

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendants John Kronberg, Constance Kronberg and Michael Kronberg for petition for certification to appeal from the Appellate Court [AC 15288], it is hereby ordered that said petition be, and the same is hereby dismissed.

Berdon, J. did not participate in the discussion or decision of this petition for certification.

BY THE COURT,

s/

_____

ASSISTANT CLERK-APPELLATE

Dated: July 3, 1997

Notice sent: 7/3/97

Clerk, Superior Court, New Haven 0309163S

Clerk, Appellate court

Reporter of Judicial Decisions

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F. Woodward Lewis, Jr.P.C. & Associates

Gager & Peterson

Loughlin, Henrici, Molloy & Rizzo, P.C.

Pullman & Comley, L.L.C.

Anita Tomaselli Satti, Assistant Attorney General

Gary F. Williams, Assisant Attorney General

F. Woodward Lewis, Jr. in support of petition; Thomas A. Kaelin in opposition

APPENDIX B

NO. A.C. 15288

FEDERAL HOME : APPELLATE COURT
LOAN MORTGAGE CORPORATION

V. : STATE OF CONNECTICUT

JOHN W. KRONBERG, :MAY 21, 1997

ORDER

THE MOTION OF THE DEFENDANT FILED APRIL 25, 1997 FOR REVIEW HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,
s/

_____
ASSISTANT CLERK-APPELLATE

NOTICE SENT: 5/21/97
GAGER & PETERSON
LAW OFFICE OF F. WOODWARD LEWIS, JR., P.C.
LOUGHLIN, HENRICI, MOLLOY & RIZZO, P.C.
PULLMAN & COMLEY, L.L.C.
ANITA TOMASELLI SATTI, ASST ATTORNEY GENERAL
GARY G. WILLIAMS, ASST. ATTORNEY GENERAL
CLERK, SUPERIOR COURT OF NEW HAVEN, JD
NNH CV 91 0309163S
HON. DONALD CELOTTO

APPENDIX C

U.S. CONSTITUTION, AMENDMENT XIV

Section 1. Citizens of the United States

All persons born or naturalized in the Unites States and subject to the jurisdiction thereof, are citizens of the Unites States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

APPENDIX D

CT RULES OF APPELLATE PROCEDURE

Sec. 4046. - In General

In all actions, except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment shall be automatically stayed until the time to take an appeal has expired; if an appeal is filed, such proceedings shall be stayed until the final determination of the cause; and it the case goes to judgment on appeal, until ten days after the decision is officially released as set forth in Sec. 4120; but if the judge who tried the case is of the opinion that an extension to appeal is sought or the appeal is taken only for delay or that the due administration of justice so requires, that judge may at any time, upon motion and hearing, order that the stay be terminated. This section shall not apply to actions concerning attorney pursuant to chapter 2, to periodic alimony and support orders, as well as to custody or visitation orders in domestic relations matters brought pursuant to chapter 17, to criminal matters brought pursuant to chapter 22 through 30 or to juvenile matters brought pursuant to chapters 31 through 40 other than any transfer orders to the regular criminal docket.

A motion to terminate the stay of execution may be filed before judgment; if it is, it may be ruled upon when judgment is entered. If such a motion is filed before the judgment, or after judgment but before an appeal, it shall be filed in triplicate with the clerk of the superior court. If it is filed after the appeal is filed, an original and three copies shall be filed with the appellate clerk and forwarded to the judge who tried the case and

that judgment shall file any rulings thereon with the appellate clerk and with the clerk of the trial court wherein the matter was tried. If the judge who tried the case is unavailable, the motion shall be forwarded to the clerk of the court in the judicial district where the case was tried and shall be assigned for a hearing and decision to any judge of the superior court.

Unless the chief justice or chief judge shall otherwise order, any stay of proceedings which was in effect during the pendency of the appeal shall continue until the time for filing a motion for reargument has expired, and, if a motion is filed, until its disposition, and, if its granted, until the appeal is finally determined. If no stay of proceedings was in effect during the pendency of the appeal and the decision of the court having appellate jurisdiction would change the position of nay party from its position during the pendency of the appeal, all proceedings to enforce or carry out the decision of the court having appellate jurisdiction shall be stayed until the time for filing a motion for reargument has expired, and, if a motion is filed, until its disposition, and, if it is granted, until the appeal is finally determined.

Sec. 4049. Review of Order

The sole remedy of any party desiring the court to review an order concerning a stay of execution shall be by motion for review under Sec. 4053. Execution of an order of the court terminating a stay of execution shall be stayed for ten days from the issuance of notice of the order, and if a motion for review is filed within that period, the order shall be stayed pending decision of the motion, unless the court having appellate jurisdiction rules otherwise.

A motion for extension of time to file a motion for review of a ruling concerning a stay of execution must be filed in the trial court but shall not automatically stay the execution after the ten days has expired, except that the trial judge may order a stay pending a ruling on the motion for extension of time.

A decision concerning a stay is a judgment in a trial to the court for purposes of Sec. 4059.

In any case in which there is no automatic stay of execution and in which the trial court refuses or fails to grant a stay expeditiously, an aggrieved party may request a stay of execution of the judgment from the court having appellate jurisdiction pending the ruling of the trial court or pending the filing of and ruling upon a motion for review. The request must be filed with the appellate clerk.

Sec. 4053. - In General

The court may, on written motion for review stating the grounds for the relief sought, modify or vacate any order made by the trial court under Sec. 4040(a) or any action by the appellate clerk under Sec. 4040(c)(2) or any order relating to the perfecting of the record for an appeal or the procedure of prosecuting or defending against an appeal, or any order made by the trial court concerning a stay of execution in a case on appeal. All petitions for review of bail shall be filed in the appellate court. Motions for review shall be filed within ten days from the issuance of notice of the order sought to be reviewed. Motions for review of the clerk's taxation of costs under judgments of the court having appellate jurisdiction shall be governed by Se. 4119.

If a motion for review of a decision concerning a

stay depends on a transcript of evidence or proceedings taken by a court reported, the moving party shall filed with the motion either a transcript or a copy of the transcript order form (JD-ES-38). The opposing party may, within one week after the transcript or the copy of the order from is filed by the moving party, file either a transcript of additional evidence or a copy of the order form.